FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RONALD RICHARD REES,
Petitioner,

No. 01-70750

v.

D.C. No.
CV-98-00407

JEAN HILL, Superintendent; HARDY MYERS,
Respondents.

OPINION

Application to File Second or Successive
Petition Under 28 U.S.C. § 2244

Argued and Submitted
November 6, 2001--Portland, Oregon

Filed March 26, 2002

Before: Procter Hug, Jr., Thomas G. Nelson, and Ronald M. Gould, Circuit Judges.

Opinion by Judge Hug

COUNSEL

Wendy R. Willis, Assistant Federal Public Defender, Portland, Oregon, for the petitioner.

Timothy A. Slywester, Salem, Oregon, for the respondent.

OPINION

HUG, Circuit Judge:

Ronald R. Rees, a prisoner of the State of Oregon, seeks leave to file a successive habeas petition. We have jurisdiction under 28 U.S.C. § 2244. For the reasons set forth below, we deny Rees' request.

In order to obtain leave to file a successive habeas petition, Rees must show that his underlying claim (1) relies on a new rule of constitutional law, (2) made retroactive to cases on collateral review by the Supreme Court, (3) that was previously unavailable. 28 U.S.C. § 2244(b)(2)(A), (3)(A), (3)(C). Rees' underlying claim is that his sentence is unconstitutional under the Supreme Court's recent decision in Apprendi v. New Jersey, 530 U.S. 466 (2000). In Apprendi , the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490. According to Rees, his sentence violates Apprendi because, despite Oregon's statutory maximum of 20 years for first degree sodomy (the crime for which he was convicted), he received a sentence of 30 years after the judge found him to be a "dangerous offender" based on a preponderance of the evidence. Given this alleged Apprendi error in his sentence, Rees argues that he is entitled to habeas relief, and seeks leave from this court to file a successive petition to obtain that relief.

[2] The parties do not dispute that the rule announced in Apprendi is a new rule of constitutional law. Additionally, the parties do not contest that the rule in Apprendi was unavailable to Rees when he filed his first habeas petition. Thus, the sole issue we must address in ruling on Rees' request is whether the Supreme Court has made Apprendi retroactive to cases on collateral review.

This issue is easily resolved under our recent decision in United States v. Sanchez-Cervantes, No. 98-35897, slip op. 4287 (9th Cir. Mar. 15, 2002). In Sanchez-Cervantes, we held, in the context of a 28 U.S.C. § 2255 habeas petition, that "Apprendi does not apply retroactively to cases on initial collateral review . . . ." Sanchez-Cervantes, slip op. at 4302. In so holding, we necessarily determined that the Supreme Court has not previously made Apprendi retroactive to cases on collateral review, lest we render a decision in direct conflict with Supreme Court precedent. See id. at 4300-01. Therefore, as required by our binding decision in Sanchez-Cervantes, we reaffirm here that the Supreme Court has not made Apprendi retroactive to cases on collateral review.

Because the Court has not mandated that Apprendi be applied retroactively on collateral review, Rees cannot meet the requirements in 28 U.S.C. § 2244 for obtaining leave to file a second petition for habeas relief. Thus, Rees' request for leave to file a second habeas petition is DENIED.